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IN THE

Supreme Court of the United States

No. ~~520~~ 518 October Term, 1948

ATLANTIC FREIGHT LINES, INC.,
Petitioner

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA and SUPPORTING BRIEF

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PENNSYLVANIA PUBLIC UTILITY COMMISSION

PETITION
For
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To
THE SUPERIOR COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petition of Atlantic Freight lines, Inc., respectfully shows:

I. SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a Petition for Writ of Certiorari to the Superior Court of Pennsylvania to obtain a review of a decision of that Court affirming an order of the Pennsylvania Public Utility Commission.

Petitioner, Atlantic Freight Lines, Inc., is a Pennsylvania corporation, with its principal place of business at 703 Second National Bank Building, Uniontown, Pennsylvania, and is engaged in the business of transporting property for compensation, exclusively in interstate commerce. It holds Certificate of Public Convenience and

Necessity Number MC77477 issued by the Interstate Commerce Commission (R. 185a-193a) to operate in interstate commerce on various routes including a certain route in Pennsylvania, Maryland and New Jersey, with intermediate pick-up and delivery points from Pittsburgh, Pennsylvania to Newark, New Jersey. Among these intermediate points is Philadelphia, Pennsylvania.

The Pennsylvania Public Utility Commission, on October 28th, 1946, issued a complaint against your petitioner for alleged violation of Article II, Section 201 (b) of the Pennsylvania Public Utility Law, Act of May 28th, 1937, P. L. 1053 (66 P.S. §1121), and amendments thereto, which makes it unlawful for any public utility "to begin to offer, render, furnish, or supply service within" Pennsylvania without first obtaining a Certificate of Public Convenience from the Pennsylvania Public Utility Commission. The Pennsylvania Public Utility Commission alleged that the following facts constituted intrastate transportation, and as such, illegal because petitioner does not hold any Certificate of Public Convenience to engage in intrastate transportation issued by the Pennsylvania Commission:

> "On or about August 17, 1946, Atlantic Freight Lines, Inc., did transport for compensation 30,000 pounds of sugar in a certain tractor and trailer from Philadelphia, Pennsylvania, to McKeesport, Pennsylvania, and said sugar was transported from Philadelphia over U. S. Highway 1 to Baltimore, Maryland, thence over U. S. Highway 40 through Maryland and Pennsylvania to Uniontown, Pennsylvania, thence over Pennsylvania Highway 51 to Pittsburgh, Pennsylvania, thence over Pennsylvania Highway 30 to McKeesport, the point of destination." (R. 235a).

After making this fact finding, which is undisputed, the Pennsylvania Commission added "this route is one of the

authorized routes contained in (petitioner's) Interstate Commerce Commission Certificate." (R. 241a).

The route, as set forth in the Interstate Commerce Commission Certificate is:

"Between Pittsburgh, Pa. and Newark, N. J.

From Pittsburgh over Pennsylvania Highway 51 to Uniontown, Pa., thence over U. S. Highway 40 to Baltimore, Md., and thence over U. S. Highway 1 to Newark, and return over the same route.

Service is authorized to and from the intermediate points of Uniontown and Philadelphia, Pa., Baltimore, Md., Trenton, N. J., those in Pennsylvania within 20 miles of Pittsburgh, and those within 25 miles of New York, N. Y., and the off-route points of East Riverton, N. J., and those in Pennsylvania within 20 miles of Pittsburgh." (R. 219a).

It is admitted that McKeesport is within 20 miles of Pittsburgh. (R. 159a).

Additional material facts are accurately stated by Commissioner (former Judge) Houck of the Pennsylvania Public Utility Commission in his dissenting opinion, as follows:

"The facts necessary to a decision on the point involved are not in dispute. The route used by respondent in this transportation was established by respondent's predecessor in 1932. On December 2, 1935, respondent's predecessor applied to the Interstate Commerce Commission for a certificate of public convenience and necessity to operate over certain routes of which this is one. The application was under the so-called "Grandfather Clause" in the Federal Motor Carrier Act of 1935, section 206 (a), upon the ground that on June 1, 1935, and thereafter, it had been engaged in bona fide operation as a common carrier by motor vehicle in interstate commerce over this and other routes.

Finally, after extensive litigation of which the Pennsylvania Commission had notice but did nothing in opposition to the granting of the certificate, the Interstate Commerce Commission, on October 8, 1945, filed its report in which it specifically found as a fact that respondent's predecessors were, on June 1, 1935, and they and Atlantic Freight Lines, Inc., as successor in interest, continuously since have been in bona fide operation as a common carrier by motor vehicle in interstate commerce over the route in question. Accordingly, a certificate of public convenience and necessity was granted by the Interstate Commerce Commission authorizing transportation in interstate commerce over the route here in question. Under its charter, respondent is limited to transportation in interstate commerce, and it holds no certificate from the Pennsylvania Public Utility Commission. Under these facts, the ultimate question for determination is whether the Pennsylvania Commission may prohibit the respondent from carrying property originating at a point in Pennsylvania for delivery at another point in Pennsylvania over a route partly in Maryland; transportation over this route having been authorized by the Interstate Commerce Commission." (R 251a-252a).

The majority of the Pennsylvania Commission answered this question "Yes". It found that the shipment was intrastate transportation, that the use of the authorized interstate route was a subterfuge to evade Pennsylvania laws, and it issued an order directing petitioner to forthwith cease and desist from rendering service as a motor carrier in intrastate commerce, except as permitted by a Certificate of Public Convenience issued by the Pennsylvania Commission (R. 250a). Petitioner has no such certificate. The Pennsylvania Commission concedes that Pennsylvania law does not require Petitioner to obtain

a Pennsylvania Certificate in order to engage in interstate transportation over Pennsylvania highways.

From the order of the Pennsylvania Public Utility Commission, your petitioner appealed to the Superior Court of Pennsylvania which affirmed the order of the Commission. (R. 283-289). Petitioner then filed in the Supreme Court of Pennsylvania a Petition for Allowance of an Appeal from the judgment of the Superior Court (R. 290-294), which was refused. Petitioner now seeks a review and reversal of the judgment of the Superior Court of Pennsylvania in this Court.

II. JURISDICTION

1. The jurisdiction of this Court is invoked under the Judicial Code, Section 237 (b) as amended by the Act of February 13, 1925, c. 229, 43 Stat. 937 (28 U. S. C. A. §344).

2. The date of the judgment of the Superior Court of Pennsylvania to be reviewed is July 27, 1948 (R. 289). A timely Petition for Allowance of an Appeal to the Supreme Court of Pennsylvania was refused on September 29, 1948 (R. 294). On December 3, 1948, by order signed by Mr. Justice Burton, the Supreme Court of the United States extended the time for filing a Petition for Writ of Certiorari to and including February 26th, 1949. (R. 319).

3. The following authorities sustain the jurisdiction of this Court: *Illinois Steel Co. v. Baltimore & Ohio R. Co.* (1944) 320 U. S. 508; *Brooklyn Savings Bank v. O'Neil* (1945) 324 U. S. 697, rehearing denied 325 U. S. 893; *U. S. Supreme Court Rule* 38, par. (5) (a).

4. This case is substantial in character. The order of the Pennsylvania Public Utility Commission threatens Petitioner's existence as a common carrier by motor vehicle limited by its charter to engaging in interstate commerce.

The order prohibits Petitioner from accepting for transportation goods which the terms of Petitioner's Interstate Commerce Commission Certificate require Petitioner to acccept and transport. The decision in this case will vitally affect other motor vehicle carriers operating within Pennsylvania under similar Interstate Commerce Commission certificates. It denied to Petitioner its rights under the Federal Motor Carrier Act of 1935 and invades Federal jurisdiction over interstate commerce.

III. QUESTIONS PRESENTED

1. In view of Article I, Section 8, and Article VI of the Constitution of the United States, is not the finding by the Interstate Commerce Commission (that petitioner's carriage of freight between the Pittsburgh, Pennsylvania area and Philadelphia, Pennsylvania, via a prescribed route running through Pennsylvania and Maryland, constitutes bona fide interstate commerce) a finding which must be accepted by the Pennsylvania Public Utility Commission?

2. Did not the transportation of freight for compensation between two points in Pennsylvania via a route running through Pennsylvania and Maryland for which route petitioner holds a certificate of public convenience and necessity issued by the Interstate Commerce Commission constitute bona fide interstate commerce and exempt such transportation from regulation by the Pennsylvania Public Utility Commission?

3. Does not the specific act finding by the Interstate Commerce Commission and the certificate of public convenience and necessity issued by it both authorize and require Petitioner as a common carrier by motor vehicle to accept freight in Philadelphia, Pennsylvania, and transport it over the prescribed interstate route and deliver it in McKeesport, Pennsylvania?

IV. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The question, whether the transportation of goods by motor carrier between two points in the same state through another state, via an authorized interstate route as defined in a final certificate of public convenience and necessity issued by the Interstate Commerce Commission, can be prohibited by a state utility commission is an important question of Federal constitutional law which has not as yet been, but should be, settled by this Court.

2. The question raised by this case involves an important question of Federal constitutional law and requires a determination of the respective spheres of jurisdiction of the Interstate Commerce Commission and a state utility commission over interstate carriers by motor vehicle; and the precise question presented in this case has never been decided by any Federal Court or any state appellate court in any other case. The question is one of such great public importance that it should be decided by this Court.

3. The question of the scope of Petitioner's rights and duties under the terms of the final Certificate of Public Convenience and Necessity issued to it by the Interstate Commerce Commission is an important question of Federal law which has not been decided by this Court or by any Circuit Court of Appeals.

4. The finding of the Interstate Commerce Commission that petitioner was engaged in "bona fide operation as a common carrier by motor vehicle, in interstate or foreign commerce" over the route involved in these proceedings was binding upon the Pennsylvania Public Utility Commission and the Superior Court of Pennsylvania, and precluded a contrary finding that transportation over said route was intrastate commerce.

5. The transportation held to be intrastate by the Pennsylvania Public Utility Commission is within the statutory definition of interstate commerce and exempt from state regulation and control: Part II of Interstate Commerce Act, Feb. 4, 1887, c. 104; Part II, §201, as added Aug. 9, 1935, c. 498; 49 Stat. 543 and amended Sept. 18, 1940, c. 722; Title I, § 15, 54 Stat. 919 (49 U. S. C. A. § 303 (a) (10)).

Wherefore, your Petitioner prays that a writ of certiorari be issued under the seal of this Court directed to the Superior Court of Pennsylvania, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Superior Court of Pennsylvania, had in the case numbered and entitled on its docket No. 98, October Term, 1948, Atlantic Freight Lines, Inc., Appellant, v. Pennsylvania Public Utility Commission, to the end that this cause be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of the said Superior Court of Pennsylvania be reversed by this Court, and for such further relief as to this Court may seem proper.

LAURENCE H. ELDREDGE,

DEAN D. STURGIS,

Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. OPINION OF THE COURT BELOW

Pennsylvania Public Utility Commission v. Atlantic Freight Lines, Inc. (1948),—Pennsylvania Public Utility Commission Reports—, (Complaint Docket No. 14174) (R. 231a-250a); Atlantic Freight Lines, Inc. v. Pennsylvania Public Utility Commission (1948), 163 Pa. Superior Ct. 215, 60 A. 2d 589 (R. 283-289).

II. JURISDICTION

State under heading II in the Petition and said statement, in the interest of brevity, is adopted and made part of this brief.

III. STATEMENT OF THE CASE

Stated under the heading I in the Petition and said statement, in the interest of brevity, is adopted and made part of this brief.

IV. SPECIFICATION OF ERRORS

1. The Superior Court of Pennsylvania erred in holding that the Interstate Commerce Commission had not assumed jurisdiction of Petitioner's transportation by motor carrier between two points in Pennsylvania through Maryland, except as part of a haul from its origin in one state to its destination in another state.

2. The Superior Court of Pennsylvania erred in holding that the Certificate of Public Convenience and Neces-

sity issued to the Petitioner by the Interstate Commerce Commission did not authorize the transportation of goods between prescribed points of origin and delivery in Pennsylvania over Pennsylvania and Maryland highways.

3. The Superior Court of Pennsylvania erred in holding that the Pennsylvania Public Utility Commission had jurisdiction to determine (after a contrary determination by the Interstate Commerce Commission) that transportation, over the route used in this case was intrastate.

4. The Superior Court of Pennsylvania erred in holding that the Pennsylvania Public Utility Commission could properly find that the transportation of goods between Philadelphia, Pennsylvania, and McKeesport, Pennsylvania, via Pennsylvania and Maryland routes was a subterfuge to evade state regulation.

5. The Superior Court of Pennsylvania erred in affirming the order of the Pennsylvania Public Utility Commission.

V. ARGUMENT

Summary

POINT A. This case involves the construction and scope of a specific fact finding as to bona fide interstate commerce by the Interstate Commerce Commission and a determination of the rights and duties of a motor carrier engaged in interstate commerce to whom the Commission has issued a final Certificate of Public Convenience and Necessity. It also involves the question whether transportation by motor carrier between two points in the same state through another state via an authorized interstate route as defined in a final Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission can be prohibited by a state utility commission. These are important questions of Federal Constitutional law as

to the respective spheres of jurisdiction of the Interstate Commerce Commission and a state utility commission over interstate motor carriers which have not been settled by this Court.

POINT B. The transportation held to be intrastate is interstate under the definition of Congress and of this Court.

POINT A.

THIS CASE INVOLVES THE CONSTRUCTION AND SCOPE OF A SPECIFIC FACT FINDING AS TO BONA FIDE INTERSTATE COMMERCE BY THE INTERSTATE COMMERCE COMMISSION AND A DETERMINATION OF THE RIGHTS AND DUTIES OF A MOTOR CARRIER ENGAGED IN INTERSTATE COMMERCE TO WHOM THE COMMISSION HAS ISSUED A FINAL CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY. IT ALSO INVOLVES THE QUESTION WHETHER TRANSPORTATION BY MOTOR CARRIER BETWEEN TWO POINTS IN THE SAME STATE THROUGH ANOTHER STATE VIA AN AUTHORIZED INTERSTATE ROUTE AS DEFINED IN A FINAL CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY ISSUED BY THE INTERSTATE COMMERCE COMMISSION CAN BE PROHIBITED BY A STATE UTILITY COMMISSION. THESE ARE IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW AS TO THE RESPECTIVE SPHERES OF JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION AND A STATE UTILITY COMMISSION OVER INTERSTATE MOTOR CARRIERS WHICH HAVE NOT BEEN SETTLED BY THIS COURT.

On October 8th, 1945, the Interstate Commerce Commission found as a fact "That applicant's predecessors were

on June 1, 1935, and the predecessors and applicant continuously since have been, except for an interruption in service over which they had no control, in bona fide operation as a common carrier by motor vehicle, in interstate or foreign commerce, of the commodities, between the points, over the route, and serving the intermediate and off-route points as specified in Appendix C" (R. 213a). Appendix C specifies as one of the routes (and it is marked No. 3) "Between Pittsburgh, Pa., and Newark, N. J.: From Pittsburgh over Pennsylvania Highway 51 to Uniontown, Pa., thence over U. S. Highway 40 to Baltimore, Md., and thence over U. S. Highway 1 to Newark. Intermediate points: Uniontown and Philadelphia, Pa., all points in Pennsylvania within 20 miles of Pittsburgh . . ." (R. 217a, 219a). It is admitted that McKeesport, Pennsylvania, is within 20 miles of Pittsburgh (R. 159a).

The Interstate Commerce Commission issued a Certificate of Public Convenience and Necessity authorizing transportation "From Pittsburgh . . . to . . . the intermediate points of . . . Philadelphia . . ." (R. 219a).

The Certificate of Public Convenience issued to Petitioner by the Interstate Commerce Commission provides that it "is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate" (R 192a).

Petitioner submits that the Interstate Commerce Commission has both authorized and directed Petitioner to provide the transportation service which the Pennsylvania Public Utility Commission prohibits.

Commissioner Houck said in his dissenting opinion: "The Commission's order, which attempts to prohibit respondent from operating over the route included in its certificate issued by the Interstate Commerce Commission, necessarily involves the proposition that we have the power

to interfere with an interstate movement, even though the field has been taken over by the federal government. The vital fact in the disposition of this case is the finding by the Interstate Commerce Commission that respondent's operation was a bona fide operation. This is the fact which distinguishes the present case from those relied on by the majority. . . . The respondent has been authorized by the federal Commission to use the route in question and that upon a finding that its operation was bona fide. In my judgment, when the federal Commission decided that question, the matter passed from the control of the State" (R. 255a, 256a). He added: "It seems to me an intolerable situation to have the Interstate Commerce Commission on one hand decide, after extensive litigation, that the use of a particular route in interstate commerce has been bona fide and to grant a certificate accordingly, and then from time to time have the State Commission investigate the same issue and reach a contrary decision. Such procedure does not resolve difficulties, it only increases them" (R. 257a-258a).

This Court is the only tribunal which can finally determine the respective spheres of jurisdiction of the Interstate Commerce Commission and a state utility commission over motor carriers engaging in interstate commerce. This is a comparatively new field of law in which there are few precedents. The "intolerable situation" in which Petitioner finds itself, and in which other carriers may find themselves, is due to the lack of a controlling decision in this Court. Since the enactment of the Federal Motor Carrier Act of 1935 this Court has never passed upon a case in which the Interstate Commerce Commission has made a specific fact finding concerning "bona fide operation" in interstate commerce and has, after hearings, issued a *final* Certificate of Public Convenience and Necessity. What scope and effect does such a fact finding have? What is the effect of final action by the Interstate Commerce Commission, and the issuance of a final Certificate, as distinct from a temporary

Certificate issued during the pendency of an application for a Certificate? These are vitally important questions today in the law of motor carrier transportation. They arise in this case. They need to be answered authoritatively by this Court as a guide to state utility commissions in their dealings with motor carriers who hold final Interstate Commerce Commission Certificates.

Article I, Section 8 of the *Constitution of the United States* gives Congress power "to regulate commerce with foreign nations and among the several states" and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . ." It cannot be disputed that the federal government has supreme power to regulate interstate commerce, and that necessarily includes the power to determine what is interstate commerce which is the subject of regulation. In *Eichholz v. Public Service Commission* (1939) 306 U. S. 268, this Court upheld the jurisdiction of the Missouri Commission where the transportation was from St. Louis, Missouri to Kansas City, Missouri, via Kansas City, Kansas, saying in its opinion:

> "When the Commission revoked the permit, the Interstate Commerce Commission *had not acted* upon appellant's application under the Federal Motor Carrier Act and *meanwhile* the authority of the State body to take appropriate action under the State law to enforce reasonable regulation of traffic upon the state highways had not been superseded." (page 273).
>
> * * * * * *
>
> "We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But *in the absence of* the exercise of federal authority, and in the light of local exigencies, the state is free to act in order to protect its legitimate interest, even though interstate commerce is directly affected." (p. 274) (Italics added.)

In this language there is an implication that where the Interstate Commerce Commission has acted and after full hearing has declared (as in this case) that the transportation in question is bona fide interstate commerce, the authority and jurisdiction of the state regulatory body has been superseded.

In 1935, Congress passed what is familiarly known as the Federal Motor Carrier Act and gave to the Interstate Commerce Commission jurisdiction over motor carriers: *Part II* of the *Interstate Commerce Act, February 4, 1887, C. 104, Part II, Section 201, as added Aug. 9, 1935, C. 948, 49 Stat. 543* and amended Sept. 18, 1940, C. 722, Title I, Section 15, 54 Stat. 919 (49 U. S. C. A. Section 301 et seq.). Section 206(a) of this Act provided that no common carrier by motor vehicle shall engage in interstate commerce unless it holds a Certificate of Public Convenience and Necessity issued by the Commission. There follows a provision which is commonly known as the "Grandfather Clause" which provides that "if any such carrier or predecessor in interest was in *bona fide operation* as a common carrier by motor vehicle on June 1st, 1935, over the route or routes or within the territory for which application is made and has so operated since that time . . . the Commission shall issue such Certificate."

In *McDonald v. Thompson* (1939) 305 U. S. 263, this Court construed the Act and said at page 266:

> ". . . The expression, 'in bona fide operation', suggests *absence of evasion*, excludes the idea that mere ability to serve as common carrier is enough, includes actual rather than potential or simulated service and in context implies recognition of the power of the state to withhold or condition the use of its highways in the business of transportation for hire. Plainly the proviso does not extend to one operating as a common carrier on public highways of a State *in defiance of its laws*." (Italics added.)

In accordance with the provision of the Federal Motor Carrier Act, the predecessor in interest of Atlantic Freight Lines, Inc., your petitioner, applied to the Interstate Commerce Commission for a Certificate of Public Convenience and Necessity under the "Grandfather Clause". Included among the routes covered in such application was the route in question in this case. Objection was made to the granting of this Certificate by various other carriers who denied that Petitioner's predecessor had been engaged in interstate commerce over certain specified routes, one of which is the route herein questioned. The matter was then litigated and the Commission decided the question in favor of Atlantic Freight Lines, Inc., and its predecessor (R. 203a-221a).

It is submitted that this finding by the Interstate Commerce Commission is conclusive and controlling. The federal power in the field of interstate commerce is paramount and Congress has vested in the Interstate Commerce Commission the power of determining when interstate commerce is "bona fide". When the Interstate Commerce Commission makes such a finding, no state body can thereafter find to the contrary.

Counsel for Petitioner have not found any case wherein it appeared that the Interstate Commerce Commission had in a contested proceeding found as a fact that the transportation in question was bone fide interstate commerce. Therefore, it is submitted that this case presents an important question of federal constitutional law which has not yet been determined by this court. It is urged that this question is of sufficient importance to justify its consideration by this Court, particularly as the decision of the Pennsylvania Public Utility Commission, affirmed by the Superior Court, is contrary to the implication in the *Eichholz* case, in this Court: Supreme Court Rule 38, par. (5) (a).

The law is clear that where a decision of the state court rests on a determination of federal law and on a misconception of federal law, this Court has power to de-

termine the federal question on which the state court based its decision and thereafter to remand the case to the state court for further proceedings. *State Tax Commission v. VanCott* (1939) 306 U. S. 511; *Standard Oil Co. of California v. Johnson* (1942) 316 U. S. 481.

The determination of the effect to be accorded a finding of the Interstate Commerce Commission in a collateral proceeding is purely a federal question.

POINT B.

THE TRANSPORTATION HELD TO BE INTRASTATE IS INTERSTATE UNDER THE DEFINITION OF CONGRESS AND OF THIS COURT.

The transportation in this case was between two points in Pennsylvania over a route which traversed Pennsylvania and Maryland highways. It is well settled that transportation between two points in the same state which goes through another state is interstate commerce:

> "It is elementary and well settled that there can be no divided authority of interstate commerce, and that the acts of Congress on the subject are supreme and exclusive. Transportation from Oxly to St. Louis over the route partly within and partly outside of Missouri is interstate commerce." *Missouri Pacific Railroad Co. v. Stroud* (1925) 267 U. S. 404, 408.

In *Central Greyhound Lines, Inc. v. Mealey* (1948) U. S. ; 92 L. Ed. (adv. opinions) 1235, Mr. Justice Frankfurter said at page 1237:

> "It is too late in the day to deny that transportation which leaves a state and enters another state is 'Commerce . . . among the several States' simply because the points from and to are in the same state."

Section 203 of the Federal Motor Carrier Act of 1935 merely put in statutory form the definition of interstate

commerce as defined in the decisions of the United States Supreme Court. This definition reads as follows:

> "The term 'interstate commerce' means commerce between any place within a State and any place in another State or *between places in the same State through another State*, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express or water." (Italics added.)

What is interstate commerce is governed by the definition of interstate commerce announced by the Supreme Court of the United States and by the definition of Congress contained in the Federal Motor Carrier Act of 1935. These definitions state positively that transportation "between places in the same State through another State" is interstate commerce.

It is therefore submitted that your Petitioner was lawfully engaged in transportation of goods by motor vehicle in interstate commerce pursuant to the Certificate of Publice Convenience and Necessity issued by the Interstate Commerce Commission. The only question of fact for determination was whether this transportation was bona fide interstate transportation. That fact had been authoritatively determined by the Interstate Commerce Commission in Petitioner's favor in a proceeding in which the Pennsylvania Public Utility Commission was given every opportunity to appear and present evidence or argument on this question (R. 131a-136a). The Pennsylvania Public Utility Commission is precluded from now collaterally attacking the finding made by the Interstate Commerce Commission. Where a state court has decided a case in conflict with decisions of this Court and the Acts of Congress, this Court has the power and authority to review and correct such erroneous decisions. *Standard Oil Co. of California v. Johnson*, supra. It is urged that this case is a proper one for the exercise of such power.

On September 8, 1948, Petitioner filed with the Interstate Commerce Commission a Petition under Section V, Sub-section D of the Administrative Procedure Act of 1946 (June 11, 1946, C. 324 § 5, 60 Stat. 239; 5 U. S. C. A. § 1004) praying for a construction of its Certificate of Public Convenience and Necessity. Petitioner had hoped to be able to bring to this Court's attention the construction placed upon Petitioner's Certificate by the Interstate Commerce Commission. However, the Pennsylvania Public Utility Commission has delayed the argument on this Petition to the Interstate Commerce Commission so that a construction by the Interstate Commerce Commission cannot be obtained prior to the expiration of the time within which Petitioner must present its Petition to this Court for a Writ of Certiorari to the Superior Court of Pennsylvania.

VI. CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the error of the Superior Court of Pennsylvania and the Pennsylvania Public Utility Commission may be corrected and that to such end a Writ of Certiorari should be granted and this Court should review the decision of the Superior Court of Pennsylvania, and finally reverse it.

Respectfully submitted,

LAURENCE H. ELDREDGE,
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Attorneys for Petitioner.

FILE COPY

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FEB 24 1949
CHARLES ELMORE

IN THE

Supreme Court of the United States

No. 518 October Term, 1948

ATLANTIC FREIGHT LINES, INC.,
Petitioner

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION OF THE COURT BELOW

The opinion of the Superior Court of Pennsylvania may be found in this case at page 283. It is officially reported in 163 Pa. Superior Court 216; 60 A. 2d 589 (1948).

QUESTIONS PRESENTED FOR REVIEW

I.

Does petitioner's certificate from the Interstate Commerce Commission authorize transportation between Philadelphia, Pennsylvania and the Pittsburgh, Pennsylvania area, via Maryland, of shipments originating in Philadelphia and destined for the Pittsburgh area?

II.

Does the routing of property between two points in one state by way of another state necessarily make those shipments bona fide interstate commerce?

III.

Does a state have the right to determine that the transportation of freight between points in that state through another state, over an indirect route, where there is a more direct route available, is not bona fide interstate commerce but a subterfuge to avoid state regulation?

ARGUMENT

I.

Petitioner's certificate from the Interstate Commerce Commission does not authorize transportation between Philadelphia, Pennsylvania, and the Pittsburgh, Pennsylvania, area, via Maryland, of shipments originating in Philadelphia and destined for the Pittsburgh area.

There is no merit to the contention of petitioner that the Interstate Commerce Commission actually made a finding as to the bona fideness of the operation complained of and that the certificate actually authorized transportation between Philadelphia, Pennsylvania and McKeesport, Pennsylvania of shipments intrastate in character.

On this issue petitioner contends that the certificate of public convenience and necessity issued to it under Section 206(a) of the Federal Motor Carrier Act (49 U. S. C. A. 306 (a)) was conclusive. This section known as the Grandfather Clause reads as follows:

> "* * * Provided, however, that if any such carrier or predecessor in interest was in *bona fide operation* as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the

territory for which application is made and has so operated since that time * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by said operation, and without further proceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after October 1, 1935, * * *" (Emphasis ours)

A reference to the report and order and the certificate issued by the Interstate Commerce Commission as appears in the record beginning at Page 202(a) reveals that the position of the petitioner cannot be sustained. Nowhere in the report and order of the Interstate Commerce Commission or in the certificate issued subsequent thereto is there any finding that the type of operation complained against was ever in issue before the Interstate Commerce Commission. There is no evidence that any shipments originating in Pennsylvania for destination to another point in Pennsylvania were brought to the attention of the Interstate Commerce Commission for adjudication as to whether such shipments were bona fide interstate commerce. The report and order of the Interstate Commerce Commission set forth beginning at page 202(a) of the record refers to three prior reports and orders reported in the Interstate Commerce Commission Reports at 41 M. C. C. 654, 43 M. C. C. 866 and 43 M. C. C. 866. In each of these reports placed in the record by the petitioner the question of whether transportation be-

tween points in Pennsylvania was bona fide was not in issue as apparently there were no such shipments transported by petitioner until recently. Thus, the issue as to whether transportation between points in Pennsylvania was bona fide interstate commerce was never before the Interstate Commerce Commission at any time, and of course there could never have been a finding that such transportation was bona fide.

Judge Hirt in speaking for the Superior Court of Pennsylvania in *Atlantic Freight Lines v. Pennsylvania Public Utility Commission,* 163 Pa. Superior Court 216, 60 A. 2d, 589 (1948), says at pages 220, 221 and 222 of 163 Pa. Superior (Record, pages 286, 287):

> "The route as approved by the Interstate Commerce Commission upon which appellant relies, is this described in the certificate of public convenience and necessity issued to it by that commission:
>
> 'Between Pittsburgh, Pa. and Newark, N. J. From Pittsburgh over Pennsylvania Highway 51 to Uniontown, Pa., thence over U. S. Highway 40 to Baltimore, Md., and thence over U. S. Highway 1 to Newark, and return over the same route. Service is authorized to and from the intermediate points of Uniontown and Philadelphia, Pa., Baltimore, Md., Trenton, N. J., those in Pennsylvania within 20 miles of Pittsburgh, and those within 25 miles of New York, N. Y.; and the off-route points of East Riverton, N. J., and those in Pennsylvania within 20 miles of Pittsburgh.'

"It seems reasonably clear from the above language of the certificate that what was authorized by the commission was interstate transportation over stated highways from Pittsburgh to Baltimore, Maryland, to Newark, New Jersey, and return, and that common carrier service was permitted between certain intermediate points of origin in one state and of destination in another. Clarification of the order, indicating that intent, is to be found in the Report and Order of the Interstate Commerce Commission in the proceeding in which appellant's interstate rights were adjudicated. It was there recognized that Atlantic was entitled to 'grandfather' rights acquired from a predecessor. Appellant was entitled to the benefit of the proviso of § 206 of the Motor Carriers Act, 49 U. S. C. A. 306(a), relating to 'grandfather' rights, only to the extent of actual and bona fide operations in interstate commerce on or before June 1, 1935. Loving et al. v. United States, 32 F. Supp. 464. The Interstate Commerce Commission, on the evidence before it, found that the prior shipments in the 'grandfather' service were 'between Baltimore, on the one hand, and, on the other, points in West Virginia and western Pennsylvania, including the Pittsburgh area, and between New York, N. Y., and certain northern New Jersey points, on the one hand, and the Pittsburgh area, on the other.' There is no reference in the report to any evidence of shipments between Philadelphia and the Pittsburgh area from which

'grandfather' or any other rights to transportation between these two points could be inferred. The Interstate Commerce Commission approved transportation from and to the Pittsburgh area along an interstate route which included Philadelphia but only as to shipments between states. It did not authorize by implication or otherwise the transportation of goods, between points of both origin and delivery within Pennsylvania, though over Maryland highways."

II.

The routing of shipments of property between two points in one state by way of another state does not necessarily make those shipments bona fide interstate commerce.

There are certain basic principles regarding a state's right to regulate intrastate commerce which we think the petitioner will not dispute.

The first of these is that a state may require an intrastate certificate of an interstate carrier who is doing intrastate business. That principle is contained in *Eichholz v. Public Service Commission of Missouri*, 306 U. S. 268, 273, 83 L. Ed. 641, 59 S. Ct. 532, (1939), rehearing denied in 306 U. S. 662, 669, 83 L. Ed. 1063 where the Court said:

> "Third, Appellant did not seek from the state commission a certificate entitling him to do an intrastate business. Under the Commission's rule, he had his choice either to refrain from carrying property between points in Missouri or to secure a certificate of public convenience and necessity as an intrastate carrier. The validity of the requirement of such a certificate to promote the proper and safe use of the state highways is not open to question. Hendrick v. Maryland, 235 U. S. 610, 622; Morris v. Duby, 274 U. S. 135, 143;

Clark v. Poor, 274 U. S. 554, 556, 557; South Carolina Highway Dept. v. Barnwell Brothers, 303 U. S. 177, 189; Compare Buck v. Kuykendall, 267 U. S. 307, 315; Interstate Busses Corp. v. Holyoke Ry. Co., 273 U. S. 45, 51; Sprout v. South Bend, 277 U. S. 163, 169."

Thus if the petitioner had interstate rights between Philadelphia and Pittsburgh over a route entirely within the state, it could hardly be argued that it did not require a certificate to engage in intrastate carriage over the same route, i. e., the transportation of property from a point of origin in Philadelphia to its final destination in Pittsburgh. The converse is also true; the Pennsylvania Commission could not require a showing of public necessity in order that a carrier might carry interstate shipments over the same route, i. e., the transportation of property between Philadelphia and Pittsburgh, the origin or final destination of which is a point outside the state of Pennsylvania.

The same principles apply if a carrier has an interstate route covering more than one state. For example, this appellant would be an interstate operator if his route went from Newark, New Jersey, to Philadelphia and thence to Pittsburgh, the Philadelphia-Pittsburgh portion being entirely within this state. But no court would deny this state the right to require a certificate of public convenience to transport property from Philadelphia to a final destination in Pittsburgh. And conversely, no court would give this state the right to require a showing of public necessity to

transport property from Philadelphia to Pittsburgh if the final destination was to be a point in some other state.

Therefore, our immediate problem is to discover what is true interstate commerce. The *route* is not the controlling factor. We admit that the route is an interstate one, but an interstate route does *not* give the right to carry *intrastate shipments* on it. The Interstate Commerce Commission has itself said that the determination of the character of a shipment depends upon the *intention* of the shipper. Did the shipper intend that the property moving between points in the same state should become part of the flow of interstate commerce? In this case the uncontradicted facts show an intention to originate the shipment in Philadelphia and end it in the Pittsburgh area. The Interstate Commerce Commission *In re Crude Talc, California Mines to Dunn, California,* No. MCC-380, 5 Federal Carriers cases (Par.) 30, 995, released October 9, 1945, says:

> "It is well established that in determining whether a particular movement of freight is in intrastate or foreign commerce, the intention existing at the time the movement starts governs and fixes the character of the shipment, providing the intention persists throughout the movement. Rush Common Carrier Application, 17 M.C.C. 661, 1 Federal Carriers Cases (Par.) 7378, and cases there referred to."

Thus the route followed, whether it merely dips into another state for a mile or two or whether it en-

compasses all forty-eight states, cannot change the intrastate character of the shipment where the normal logical route lies entirely within the boundaries of one state.

There seems to be a great deal of confusion between a determination of the character of the route and the character of the shipment in question. We do not question that a certain route may in fact be interstate, but that fact does not make all shipments over it bona fide interstate commerce, and cannot deprive a state of its right to regulate. Petitioner relies strongly on The Federal Motor Carrier Act of August 9, 1935, (49 U.S.C.A. Sec. 303 (a) (10)):

> "§303. Definitions and exceptions.
>
> (a) Definitions. As used in this chapter—
>
> * * *
>
> (10) The term 'interstate commerce' means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."

The preceding section of the same Act (49 U.S.C.A. Sec. 302(b)) expressly disavows any jurisdiction over intrastate commerce:

> "§302. Application of provisions
>
> * * *
>
> (b) Nothing in this chapter shall be construed to affect the powers of taxation of the sev-

eral states or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

Both the Superior Court of Pennsylvania and this Honorable Court have held that the mere routing of shipments between two points in one state by way of another state does not take away a state's rights to protect its intrastate interests. *Eichholz v. Public Service Commission of Missouri,* 306 U. S. 268 (1939); *Ryan et al. v. Pennsylvania Public Utility Commission,* 143 Pa. Superior Ct. 517, 17 A. 2d 637 (1941). We contend that the court decisions have limited the scope of the definition of "interstate commerce", cited above, so that it does not apply to situations where the intention of the shipper is to accomplish the transportation of property from one point to another in the same state.

III.

A state has the right to determine that the Transportation of freight between points in that state through another state, over an indirect route, where there is a more direct route available, is not bona fide interstate commerce but a subterfuge to avoid state regulation.

Petitioner contends that the Commonwealth of Pennsylvania is precluded from determining whether its transportation for compensation of sugar from Philadelphia, Pennsylvania to McKeesport, Pennsylvania, via Maryland, is not bona fide interstate commerce but a subterfuge to avoid state regulation. Petitioner in support of its contention relies upon a certificate of public convenience issued to it by the Interstate Commerce Commission under authority of the Grandfather Clause of the Federal Motor Carrier Act, supra.

We respectfully submit that the contentions of the defendant are not supported by the judicial pronouncements of the courts. In *Grubb v. Public Utilities Commission of Ohio et al.*, 281 U. S. 470 (1930), it was held that state and federal courts have concurrent jurisdiction over civil suits arising under the Constitution and laws of the United States, including the Commerce Clause, save in exceptional instances where jurisdiction has been restricted by Congress to the

federal courts. This raises the question of whether the Federal Motor Carrier Act has so occupied the field as to prohibit a state commission or a state court from determining that commerce between two points in the same state via another state, the transportation of which on a normal routing would be entirely within that state, is subject to state regulation.

Prior to the passage of the Federal Motor Carrier Act, it was held in *Inter-City Coach Co. v. Atwood, et al.,* 21 Federal (2d) 83 (1927), that to constitute "interstate commerce" by a bus line, it was not sufficient that its busses cross a state line but that they must transport passengers or goods interstate or be intended in good faith to do so. The Court said on page 85:

> "* * * In our opinion, interstate commerce, in order to be entitled to the protection of the federal Constitution, must be real and bona fide. The question whether it is so is open to inquiry.
>
> "Freedom of commercial intercourse between the states, as the Supreme Court has repeatedly held, is of such paramount importance that interference with it by the states cannot be permitted; and the powers of the states have been restricted accordingly. Western Union Tel. Co. vs. Kansas, 216 U. S. 1, 30 S. Ct. 190, 54 L. Ed. 355. *But the commerce thus protected is real commerce. It has never been held, and we believe never intended, that a mere fiction of interstate commerce may be so availed of as to deprive a state of its power to enforce sound regulation of the use of its highways*

in intrastate commerce. Interstate Busses v. Holyoke Street R. Co., 273 U. S. 45, 51, 47 S. Ct. 298, 71 L. Ed. 530." (Appeal refused by Supreme Court, 278 U. S. 663). (Emphasis ours)

The Superior Court of Pennsylvania in passing upon a factual situation similar with the instant case, and similar to *Inter-City Coach Company v. Atwood,* supra, quoted the above language in *Blackmore et al. v. Public Service Commission,* 120 Pa. Superior Court 437 (1936), and said further on page 448:

"* * * As we have indicated the question of subterfuge is one of fact to be determined by the commission; * * *"

We submit that under the law, prior to the passage of the Federal Motor Carrier Act, it was an established principle that a state could determine whether or not a motor carrier was engaged in bona fide interstate transportation or was operating as a subterfuge.

A review of the Federal Motor Carrier Act (49 U.S.C.A. 301 et seq.) does not reveal an intention of Congress to exclude the authority of states to pass upon the question as to whether or not an operation is bona fide interstate commerce or a subterfuge. Section 302, Title 49 U.S.C.A. contains a "Declaration of policy and delegation of jurisdiction to the Interstate Commerce Commission." By subdivision (a) of said section, it is the expressed purpose of the Congress to "cooperate with the several states and the duly authorized officials thereof * * * in the administration and

enforcement of this chapter." And then by subdivision (b):

> "Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each state of the power of regulation of intrastate commerce by motor carriers on the highways thereof. (Feb. 4, 1887, C. 104, Part II, 202, as added Aug. 9, 1935, C. 498, 49 Stat. 543.)"

This section clearly shows that Congress intended to leave with each State the exclusive right to regulate and control intrastate commerce by motor carriers on the highways of such states. This exclusive right could not be exercised properly if a State had no power to determine that an operation between points in that State, through another State, was not bona fide interstate commerce.

The petitioner has attempted to cloak itself with the phrase, "bona fide interstate commerce", as found in 49 U.S.C.A. Section 306, the Grandfather Section of the Federal Motor Carrier Act, under which a certificate of public convenience was granted to Atlantic Freight Lines, Inc. However, the phrase "bona fide" is not a safe haven for this operator which is operating on the highways of the Commonwealth of Pennsylvania in outright defiance of its laws. In *McDonald v. Thompson et al.*, 305 U. S. 264 (1938), a suit was brought against the members of the Texas Railroad

Commission, seeking to enjoin that Commission from enforcing a Texas statute which required every carrier of property by motor vehicle over Texas highways to obtain from the Railroad Commission a certificate of convenience and necessity. The plaintiff contended that it had been in bona fide operation in interstate commerce on Texas highways at the time the Federal Motor Carrier Act was passed and insisted that notwithstanding state law he was entitled to continue operations under the Grandfather Clause. The plaintiff had been denied a certificate by the Texas Commission and the Court stated that the operation had been without authority of the Texas Commission and, unless within the proviso of the Federal Act, without authority of federal law, and stated further on page 266 as follows:

> "Exact definition of 'bona fide operation' is not necessary. As the Act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms. Piedmont and Northern Ry. Co. v. Interstate Commerce Comm'n., 286 U. S. 299, 311. *To limit the meaning to mere physical operation would be to eliminate 'bona fide'.* That would be contrary to the rule that all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent. Ginsberg and Sons v. Popkin, 285 U. S. 204, 208. Ex Parte Public National Bank, 278 U. S. 101, 104. There is noth-

ing to justify rejection of these qualifying words. The expression 'in bona fide operation,' suggests absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service *and in context implies recognition of the power of the state to withhold or condition the use of its highways in the business of transportation for hire. Plainly the provision does not extend to one operating as a common carrier on public highways of a State in defiance of its laws.*

"As petitioner is not protected in his operations as a common carrier by the proviso, we need not consider to what extent, if at all, the Federal Motor Carrier Act superseded the state Motor Truck Law, or any other question presented by petitioner." (Emphasis ours)

Section 2, paragraph 6 of the Public Utility Law of Pennsylvania (Act of May 28, 1937, P. L. 1053, 66 Purdon's Pennsylvania Statutes Annotated, Section 1102, paragraph 6) defines a "common carrier by motor vehicle" as follows:

" 'Common Carrier by Motor Vehicle' means any common carrier who or which holds out or undertakes the transportation of passengers or property, or both, or any class of passengers or property, between points within the Commonwealth by motor vehicle for compensation, * * *"

It is to be noted that under this section of the law, any transportation of passengers or property between

points within this Commonwealth for compensation becomes a public utility under Section 2 paragraph 17(c) of the Public Utility Law of Pennsylvania, (Act of May 28, 1937, P. L. 1053, 66 Purdon's Pennsylvania Statutes Annotated, Section 1102, paragraph 17(c)) which reads:

> "'Public Utility' means persons or corporations now or hereafter owning or operating in this Commonwealth equipment, or facilities for:
>
> * * *
>
> (c) Transporting passengers or property as a common carrier."

Section 201 of the Public Utility Law of Pennsylvania (Act of May 28, 1937, P. L. 1053, 66 Purdon's Pennsylvania Statutes Annotated, Section 1121) requires the common carrier to obtain a certificate of public convenience to conduct the operation.

There can be no question that the shipment of freight in the instant case was between points in the Commonwealth of Pennsylvania and for the petitioner to conduct this type of business without a certificate of public convenience from the Pennsylvania Public Utility Commission constitutes an operation on the highways of Pennsylvania in defiance of its laws.

The issuance of a certificate to Atlantic Freight Lines, Inc. by the Interstate Commerce Commission does not preclude Pennsylvania from determining whether Atlantic's operation constitutes a subterfuge to evade regulation. It is respectfully submitted that

Pennsylvania is not powerless to protect its intrastate commerce.

Your Honorable Court in *Eichholz v. Public Service Commission of Missouri*, supra, held that even though the Interstate Commerce Commission had taken provisional jurisdiction of the transportation involved, namely between points in the same State via another State, that nevertheless, the State Commission had authority to find from the facts that such operations were a subterfuge and to enjoin such transportation.

The Superior Court of Pennsylvania in *Ryan et al. v. Pennsylvania Public Utility Commission*, supra, considered the effect of the Grandfather Clause of the Federal Motor Carrier Act upon the jurisdiction of the Pennsylvania Public Utility Commission and stated as follows on page 526 of 143 Pa. Superior:

> "The Federal Motor Carrier Act of August 9, 1935, (49 U.S.C.A. Sec. 302c) expressly recognized the right of the several states to regulate intrastate carriage. The Supreme Court of the United States in the Eichholz case, supra, which involved a situation substantially analogous to the present case, *very definitely stated that a state Commission has jurisdiction to determine the question whether carrying merchandise across state lines is bona fide or a mere subterfuge to evade the state Commission's jurisdiction.* It ruled, p. 273, that mere pendency before the Interstate Commerce Commission of an application by a motor carrier

to operate under the Federal Motor Carrier Act in interstate commerce did not supersede the authority of the state body to take appropriate action under the State law to enforce reasonable regulations of traffic on the state highways. Mr. Chief Justice Hughes said, p. 274:

> 'If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions * * * was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint' ". (Emphasis ours)

An appeal to the Supreme Court of Pennsylvania was refused in the *Ryan* case and Certiorari to the Supreme Court of the United States was denied at 314 U. S. 640 (1941).

The instant case is even stronger than either the *Eichholz* or *Ryan* cases, supra, since it is clear from the certificate that was granted petitioner by the Interstate Commerce Commission that it did not authorize by implication or otherwise the transportation of goods, between points of both origin and delivery within Pennsylvania, though over Maryland Highways. An obvious example of the meaning of an Interstate Commerce Commission certificate would be one granting the right to transport property between Harrisburg and Pittsburgh over Pennsylvania highways.

Certainly the implication is that such authority covers only shipments in interstate commerce, i. e., shipments coming from or destined for another state.

Thus under all the law and facts in this case, we respectfully contend that the Commonwealth of Pennsylvania was not precluded from determining that said operation did not constitute bona fide interstate commerce but was a subterfuge and in violation of the laws of the Commonwealth.

Respondent vehemently denies the statement made by petitioner on page 19 of its brief that respondent has delayed the argument on petitioner's petition filed with the Interstate Commerce Commission under Section V, Sub-section D of the Administrative Procedure Act of 1946 (June 11, 1946, C. 324 §5 60 Stat. 239; 5 U.S.C.A. §1004) praying for a construction of its certificate of public convenience and necessity. Respondent upon receipt of a copy of said petition did immediately file an answer thereto with the Interstate Commerce Commission. The procedural control of the proceedings rests entirely with the Interstate Commerce Commission and as yet to our knowledge the matter has never been set for hearing or argument. Furthermore petitioner has raised a matter which is not a part of the record in the case presented for consideration by your Honorable Court.

CONCLUSION

Under the law and the facts, we respectfully urge your Honorable Court to deny the prayer of the petition for Writ of Certiorari.

Respectfully submitted,

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[redacted]

[redacted]

No. 816.

[redacted]

v.

[redacted]

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ANSWER TO PETITION AND BRIEF FOR RESPONDENT IN THE SUPREME COURT OF PENNSYLVANIA

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1948.

No. 518.

ATLANTIC FREIGHT LINES, INC.,
Petitioner,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent.

TARIFF & ENFORCEMENT DIVISION, PHILADELPHIA CHAPTER, PENNSYLVANIA MOTOR TRUCK ASSOCIATION,
SUPER HIGHWAY EXPRESS, INC.,
PHILADELPHIA-PITTSBURGH CARRIERS,
LANCASTER TRANSPORTATION COMPANY,
KRAMER BROS. FREIGHT LINES,
W. HUNTER ATKINSON, INC.,
Intervening Respondents.

ANSWER TO PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

I.

COUNTER-STATEMENT OF QUESTIONS INVOLVED.

1. Did the Pennsylvania Public Utility Commission have jurisdiction to determine whether petitioner's transportation between points in Pennsylvania via an interstate route was a subterfuge to evade regulation by the State Commission, and does such a determination involve a Federal Constitutional question.

2. Was not the transportation by petitioner for compensation of sugar from Philadelphia, Pennsylvania to McKeesport, Pennsylvania over a route from Philadelphia via

U. S. Highway 1 to Baltimore, Maryland, thence over U. S. Highway 40 through Maryland and Pennsylvania to Uniontown, Pennsylvania, thence over Pennsylvania Highway 51 to Pittsburgh, Pennsylvania, thence over Pennsylvania Highway 30 to McKeesport, Pennsylvania, a subterfuge to evade regulation by the Pennsylvania Public Utility Commission.

II. COUNTER-HISTORY OF THE CASE.

On October 28, 1946, the Pennsylvania Public Utility Commission upon its own motion instituted a complaint against Atlantic Freight Lines, Inc., petitioner herein, for violation of the Pennsylvania Public Utility Law. The complaint alleges that on or about August 17, 1946, Atlantic Freight Lines, Inc., transported for compensation 30,000 pounds of sugar from Philadelphia, Pennsylvania to McKeesport, Pennsylvania via an interstate route through Baltimore, Maryland. The complaint also alleges that on or about September 10 and 11, 1946, Atlantic Freight Lines, Inc., transported for compensation, 30,000 pounds of sugar from Philadelphia, Pennsylvania to Pittsburgh, Pennsylvania over highway routes wholly within the State of Pennsylvania.

The Pennsylvania Public Utility Commission, by its order of March 2, 1948, ordered Atlantic Freight Lines, Inc., to cease and desist from the rendition of service as a motor carrier in intrastate commerce and sustained the complaint as to the violations mentioned above (R. 321a-258a). *Atlantic Freight Lines, Inc., has admitted the illegal transportation that occurred on or about September 10 and 11, 1946,* and the only question now before your Honorable Court on appeal is the cease and desist order as to the transportation that occurred on or about August 17, 1946 of 30,000 pounds of sugar from Philadelphia, Pennsylvania to McKeesport, Pennsylvania by an interstate routing through Baltimore, Maryland.

On April 1, 1948, the Superior Court granted permission for leave to intervene as appellees, Tariff and Enforcement Division, Philadelphia Chapter, Pennsylvania Motor Truck Association, Inc., Philadelphia-Pittsburgh Carriers, Super Highway Express, Inc., Lancaster Transportation Company, Kramer Brothers Freight Lines, Inc., and W. Hunter Atkinson (R. 273-274). The Tariff and Enforcement Division, Philadelphia Chapter, Pennsylvania Motor Truck Association, Inc., was created to provide service and cooperate with the Pennsylvania Public Utility Commission in the enforcement of the Pennsylvania Public Utility Law and is vitally interested in the outcome of this case. Philadelphia-Pittsburgh Carriers, Super Highway Express, Inc., Lancaster Transportation Company, Kramer Brothers Freight Lines, Inc., and W. Hunter Atkinson are common carriers by motor vehicle authorized by the Pennsylvania Public Utility Commission to perform transportation of general commodities between all of the points involved in the complaint proceeding brought by the Pennsylvania Public Utility Commission. Each of these carriers are vitally interested in the outcome of this case as Atlantic Freight Lines, Inc., the petitioner herein, is operating in direct competition with these carriers and in violation of the Pennsylvania Uublic Utility Law.

From the order of the Pennsylvania Public Utility, petitioner appealed to the Superior Court of Pennsylvania which affirmed the order of the commission (R. 283-289). A Petition for Allowance of an Appeal to the Supreme Court of Pennsylvania was refused (R. 290-294). Petitioner now seeks a writ of Certiorari.

III. ARGUMENT.

1. The Pennsylvania Public Utility Commission Has Jurisdiction to Determine Whether Petitioner's Transportation Between Points in Pennsylvania Via an Interstate Route Is a Subterfuge to Evade Regulations by the State Commission and Such Determination Does Not Involve a Federal Constitutional Question, Nor Interpretation of Federal Law.

The jurisdiction of the Interstate Commerce Commission over interstate transportation by motor vehicles, was conferred by the Federal Motor Carrier Act, 1935 (49 U. S. C. A. 301 et seq.).

49 U. S. C. A. 302 (b) reads:

> "Nothing in this Chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof (Feb. 4, 1887, c. 104, Part II, 202 as added Aug. 19, 1935, c. 498, 49 Stat. 543)."

Thus Congress has by the very statute which conferred jurisdiction upon the Interstate Commerce Commission over interstate transportation of motor carriers, expressly recognized the power of each State to regulate intrastate commerce of motor carriers on the highways of the individual States.

However, petitioner contends that the Federal Government has supreme power to regulate interstate commerce and that necessarily includes the power to determine what is the interstate commerce which is the subject of regulations. With this statement of the law we have no dispute. But petitioner further contends that since the Interstate Commerce Commission has issued a certificate of

public convenience and necessity authorizing appellant to transport as a common carrier between Philadelphia, Pennsylvania and McKeesport, Pennsylvania, by a combination of its routes, that the Federal Government through its designated agency has conclusively determined that petitioner may transport shipments intrastate in character between Philadelphia and McKeesport under its certificate whether such shipments be bona fide interstate shipments or not. And it contends that the Public Utility Commission has no jurisdiction to interfere with such transportation. This argument is unsound for several reasons and has been rejected by both the U. S. Supreme Court and the Superior Court of Pennsylvania in decisions involving practically the same facts. *The issues involved in this case have conclusively been decided by your Court in the two cases below.* In *Eichholz v. Public Service Commission* (1939), 306 U. S. 268 it was held that even though the Interstate Commerce Commission had taken provisional jurisdiction of the transportation involved, namely between points in the same State via another State, that nevertheless, the State Commission had authority to find from the facts that such operations were a subterfuge and enjoined such transportation.

In *Ryan, et al. v. Pa. P. U. C.* (1940), 143 Pa. Superior Ct. 517, 17 A. 2d 637 (certiorari to the Supreme Court of the United States denied, 314 U. S. 640), the facts were very similar to those of this case. In that case the motor carrier operated between Pittsburgh, Pennsylvania and Uniontown, Pennsylvania via Wheeling, West Virginia. The carrier had pending before the Interstate Commerce Commission an application for authority to perform such transportation under the so-called "grandfather clause" of the Federal Motor Carrier Act. The Interstate Commerce Commission had issued a provisional order authorizing such transportation and had found that such operations were bona fide. The Superior Court of Pennsylvania sustained the finding of the Pennsylvania Public Utility Commission that it had jurisdiction to determine whether such operations

were bona fide interstate commerce or a subterfuge and in reality intrastate commerce. Said the Court at page 526:

> "The Federal Motor Carrier Act of August 9, 1935 48 U. S. C. A. sec. 302 (c) expressly recognized the right of the several States to regulate intrastate carriage."

And at page 525, it was stated:

> "Whether such transportation is bona fide interstate commerce or a subterfuge is primarily an administrative question involving facts to be determined by the Commission. If, as here, there is sufficient evidence to support its findings, we do not interfere therewith. It is not our duty to exercise our independent judgment as no question of confiscation is involved."

And at page 526, it was stated:

> "The provisional order of the Interstate Commerce Commission authorizing interstate commerce between certain fixed termini certainly cannot be construed as granting authority to appellant to engage in the kind of transportation here questioned nor does it interfere with the Pennsylvania Commission's jurisdiction."

In *Blackmore, et al. v. P. S. C.* (1936), 120 Pa. Superior Ct. 437, the Pennsylvania Court held that the transportation of freight between two points in the same State constituted intrastate transportation, even though the transportation was by a route partly in another State, where such route was abnormal and merely a subterfuge to avoid regulations. Said the Court at page 448:

> " 'Interstate Commerce, in order to be entitled to the protection of the federal Constitution, must be real and bona fide. The question whether it is so is open in inquiry. . . . But the commerce thus protected is real commerce. It has never been held, and we believe

never intended, that a mere fiction of interstate commerce may be so availed of as to deprive a state of its power to enforce sound regulation of the use of its highways in intrastate commerce': Inter-City Coach Co. v. Atwood, 21 Fed. (2) 83, 85. (Appeal refused by Supreme Court, 278 U. S. 663.) As we have indicated, the question of subterfuge is one of fact to be determined by the commission, and we are all of the opinion that the evidence offered was sufficient to sustain such a finding."

And so in this case there is no question but what the Pennsylvania Public Utility Commission had jurisdiction to determine whether or not the petitioner's operation was a subterfuge and in reality intrastate commerce subject to its jurisdiction. Under the language of the *Ryan* case, it is immaterial that the Interstate Commerce Commission had not finally acted by issuing a certificate. A provisional compliance order is just as much a taking of jurisdiction by the Federal Government as would be a final order issued after a determined length of time. *The only real issue is whether or not the Interstate Commerce Commission had actually made any finding as to whether the operation complained of was bona fide and not a subterfuge and if so whether or not the certificate issued by the Interstate Commerce Commission actually authorized transportation between Philadelphia, Pennsylvania and McKeesport, Pennsylvania of shipments intrastate in character or otherwise.*

On this issue petitioner contends that the certificate of public convenience and necessity issued to it under section 206 (a) of the Federal Motor Carrier Act (49 U. S. C. A. 306 (a)) was conclusive. This section known as the "grandfather clause" reads as follows:

". . . Provided, however, That . . . if any such carrier or predecessor in interest was in *bona fide operation* as a common carrier by motor vehicle on

> June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since the time . . . the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after October 1, 1935, . . ."

A reference to the report and order and the certificate issued by the Interstate Commerce Commission as appears in the record beginning at Page 202 (a) reveals that the position of the petitioner cannot be sustained. Nowhere in the report and order of the Interstate Commerce Commission or in the certificate issued subsequent thereto is there any finding that the type of operation complained against was ever in issue before the Interstate Commerce Commission. There is no evidence of any shipments originating in Pennsylvania for destination to another point in Pennsylvania having ever been brought to the attention of the Interstate Commerce Commission for adjudication as to whether such shipments were bona fide interstate commerce. The report and order of the Interstate Commerce Commission set forth beginning at page 202 (a) of the record refers to three prior reports and orders reported in the Interstate Commerce Commission Reports at 41 M. C. C. 654, 43 M. C. C. 866 and 43 M. C. C. 866. These reports are printed in full in the record at pages 308-312. In each of these reports the question of whether transportation between points in Pennsylvania was bona fide was not in issue as apparently there were no such shipments transported by petitioner until recently. Thus, the issue as to whether transportation between points in Pennsylvania was bona fide interstate commerce or a subterfuge was never before the Interstate Commerce Commission at any time and of course there

could never have been a finding that such transportation was bona fide. The expression "bona fide operation" as contained in the "grandfather clause" has been defined by our Federal Courts. In *Goncz v. Interstate Commerce Commission* (1942) 48 F. Supp. 286, page 288, it was stated:

> "The test of 'bona fide operation' carries the connotation of 'substantial, as distinguished from incidental, sporadic, or infrequent service'. United States v. Carolina Freight Carriers Corp., 1942, 315 U. S. 475, 480, 481, 62 S. Ct. 722, 726, 86 L. Ed. 971. The Commission's responsibility to bring greater order and stability to our national transportation system is an additional reason for 'insistence upon a showing of substantial service in that territory which is sought to be covered by a certificate under the "grandfather clause" '. United States v. Carolina Freight Carriers Corp., supra, 315 U. S. at page 481, 62 S. Ct. at page 726, 86 L. Ed. 971".

In *Loving v. United States* (1940), 32 F. Supp. 464, at page 466, it was stated:

> "At the outset, it should be noted that in considering the expression contained in the Act, 'in bona fide operation', the United States Supreme Court stated that such an expression 'suggests absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service, . . .' McDonald v. Thompson, 305 U. S. 263, 59 S. Ct. 176, 178, 83 L. Ed. 164."

Thus, the Interstate Commerce Commission in granting petitioner a certificate under the "grandfather clause" did so after finding that its operations were bona fide to the extent that the prior operations had been substantial and actual rather than potential or simulated. The granting and the certificate based on bona fide operations does

not necessarily mean that the question as to whether certain operations, namely transportation between points in one State via another State, were in fact bona fide interstate commerce and not operations in the nature of a subterfuge. If such shipments were not presented to the Interstate Commerce Commission no findings concerning whether they were bona fide could be made. Even though the certificate granted to petitioner authorized by a combination of the routes, transportation of interstate shipments by an interstate route between Philadelphia and McKeesport such authorization if intended must have been based on proof of shipments that were interstate in character when originally picked up in Philadelphia in that they had come into Philadelphia from outside the State by rail, water, or by another truck line. But in any event the reports and orders of the Interstate Commerce Commission upon which petitioner's certificate is based reveal no evidence of any shipments of the nature now contended to be a subterfuge. Nor can it be said that this is a collateral attack on the certificate. It is merely explaining and interpreting the certificate as issued. Certainly appellant cannot complain as the report and order of the Interstate Commerce Commission upon which the certificate is based was placed in the record by it and not by the Pennsylvania Public Utility Commission.

The above argument is based on the assumption that the certificate of public convenience and necessity of petitioner authorized by a combination of routes transportation of interstate shipments between Philadelphia and the Pittsburgh-McKeesport area. However, we do not believe that the certificate as issued authorized any transportation between Philadelphia and the Pittsburgh-McKeesport area.

Sec. 208 (a) of the Federal Motor Carrier Act (49 U. S. C. A. 308 (a)) states:

> "Any certificate issued . . . shall specify the service to be rendered and the routes over which the

fixed termini, if any, between which * * * the motor carrier is authorized to operate;"

The Superior Court of Pennsylvania in this case adequately disposed of the question as to whether or not petitioner's certificate authorized any transportation between Philadelphia and Pittsburgh-McKeesport areas. See *Atlantic Freight Lines, Inc. v. Public Utility Commission* (1948), 163 Pa. Superior Ct. 215 (60 A. 2d), (R. 283-289). Said the Court at page 220 (Record 286):

"It seems reasonably clear from the above language of the certificate that what was authorized by the commission was interstate transportation over stated highways from Pittsburgh to Baltimore, Maryland, to Newark, New Jersey, and return, and that common carrier service was permitted between certain intermediate points of origin in one state and of destination in another. Clarification of the order, indicating that intent, is to be found in the Report and Order of the Interstate Commerce Commission in the proceeding in which appellant's interstate rights were adjudicated. It was there recognized that Atlantic was entitled to 'grandfather' rights acquired from a predecessor. Appellant was entitled to the benefit of the proviso of 206 of the Motor Carriers Act, 49 U. S. C. A. 306 (a), relating to 'grandfather' rights, only to the extent of actual and bona fide operations in interstate commerce on or before June 1, 1935. Loving, et al. v. United States, 32 F. Supp. 464. The Interstate Commerce Commission, on the evidence before it, found that the prior shipments in the 'grandfather' service were between Baltimore, on the one hand, and, on the other, points in West Virginia and western Pennsylvania, including the Pittsburgh area, and between New York, N. Y., and certain northern New Jersey points, on the one hand, and the Pittsburgh area, on the other.' There is no reference in the report to any evidence of ship-

ments between Philadelphia and the Pittsburgh area from which 'grandfather' or any other rights to transportation between these two points could be inferred. The Interstate Commerce Commission approved transportation from and to the Pittsburgh area along an interstate route which included Philadelphia but only as to shipments between states. It did not authorize by implication or otherwise the transportation of goods, between points of both origin and delivery within Pennsylvania, though over Maryland highways. Since the commission has not characterized such transportation interstate, our Public Utility Commission had jurisdiction to inquire whether the commerce in question was intrastate, in fact. This language of the Chief Justice in Eichholz v. Public Service Commission, 306 U. S. 622, 59 S. Ct. 532, is pertinent: 'We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected.' Ryan, et al. v. Pa. P. U. C., 143 Pa. Superior Ct. 517, 17 A. 2d 637, (allocature refused, and certiorari to the Supreme Court of the United States denied, 314 U. S. 640), is to the same effect. In both the Eichholz and the Ryan cases the factual background was somewhat similar to that of the present proceeding."

From the above discussion it appears conclusively that petitioner's certificate did not authorize the transportation complained of and that, therefore, the Pennsylvania Public Utility Commission had jurisdiction to determine whether such transportation was a subterfuge and having so determined there is no question concerning the Federal Constitution or Federal Law involved in these proceedings.

2. Petitioner's Operation Between Philadelphia, Pennsylvania, and McKeesport, Pennsylvania, Was a Subterfuge to Evade the Jurisdiction of the Pennsylvania Public Utility Commission and Such Determination Does Not Involve a Federal Constitutional Question, Nor Interpretation of Federal Law.

In determining whether or not the shipment alleged in the Pennsylvania Public Utility Commission's complaint was a subterfuge, the following factors have been considered to be important:

(a) Whether or not the tariff rate charged for the transportation via the interstate route is less than the lawfully charged rate via a wholly intrastate route;

(b) Whether or not the distance via the interstate route is longer than via the intrastate route;

(c) Whether or not the time involved in the transportation is greater via the interstate route than via the wholly intrastate route;

(d) Whether or not the carrier had any legitimate reason for taking an interstate route because of terminals located in another state or whether or not goods were to be delivered or picked up on the route in a state other than the state of origin and destination.

Applying these factors to the evidence in this case, the uncontradicted testimony reveals that the intrastate rate for the transportation of the commodity involved in the Commission's Complaint at Paragraph 2 was 49¢ per hundred pounds (R. 169a). The interstate tariff rate was only 35¢ per hundredweight (R. 142a). The distance via the route wholly within the State of Pennsylvania was admitted by stipulation of counsel to be: via one route, 293.55 miles; via another intrastate route 287.44 miles; and via another intrastate route, 313 miles. The route which petitioner, Atlantic Freight Lines, was authorized to use under its certificate granted by the Interstate Commerce Commission in-

volved a distance of 348 miles (R. 156, 157, 158, 159a). The evidence revealed that the normal route was via the intrastate route and involved a driving time of 10 hours while the interstate route involved a driving time of round 18 hours (R. 150a). The evidence is further uncontradicted that petitioner had no legitimate operating reason for using the interstate route via Baltimore. It may well be that petitioner had a terminal at Baltimore, but the testimony is definite that the truck involved in this Complaint did not report to the terminal nor was any of the shipment unloaded at the terminal nor any pick-up made at the terminal located in Baltimore. Further, the evidence is clear that no pick-up or delivery was made at any point outside the State of Pennsylvania. There is further no evidence that any legitimate interstate shipments were dependent upon the petitioner operating via an interstate route. Thus, the evidence establishes all of the facts which the courts have held to be important in determining whether or not transportation between two points in one State via another is a subterfuge. See *Interstate Busses Co. v. Holyoke Street Railway Co.,* (1927) 273 U. S. 45; *Eichholz v. Public Service Commission,* (1939) 306 U. S. 268; *Blackmore, et al. v. P. S. C.,* (1936) 120 Pa. Superior Ct. 437; *Railway Express Agency, Inc. v. Pa. P. U. C.,* (1939) 134 Pa. Superior Ct. 405; *Ryan, et al. v. Pa. P. U. C.,* (1940) 143 Pa. Superior Ct. 517.

In *Ryan, et al. v. Pa. P. U. C., supra,* the respondent operated between two points in Pennsylvania via another state. The respondent had been authorized by the Interstate Commerce Commission to operate via the interstate route by the issuance of a compliance order to it from the Interstate Commerce Commission. The Commission in that case held that the operation by the respondent was a subterfuge, and issued a cease and desist order. The Superior Court of Pennsylvania affirmed the Commission's decision, and in its discussion the Court stated that the fact that a higher rate was charged via the interstate route was significant, and the fact that the interstate route was longer

was also significant in sustaining the order that the operation was a subterfuge.

In *Eichholz v. Public Service Commission, supra,* the facts revealed that Eichholz held a permit from the Missouri Public Service Commission to operate as a motor carrier over the highways of Missouri between points in Missouri and points beyond that State, exclusively in interstate commerce. He did not hold an intrastate permit. The Missouri Commission revoked the interstate permit issued by it to Eichholz on the ground that he had unlawfully engaged in intrastate commerce under the pretense of transporting interstate business; that as a subterfuge he had hauled freight originating in St. Louis, Missouri and destined to Kansas City, Missouri and vice versa through his terminal in Kansas City, Kansas, which was located less than one-half mile from the Missouri state-line. In determining that the operations of Eichholz were a subterfuge the Court stressed the fact that in transporting between points in Missouri, Eichholz after reaching the terminal in Kansas City, Kansas, in many instances did not unload the merchandise, but returned the shipments to Missouri and having only changed drivers or tractors.

In the operation complained of the subterfuge is even more clear. Petitioner maintained a terminal at Baltimore, Maryland, but the evidence is uncontradicted that the truck driver in passing through Baltimore did not stop at the terminal nor did he even call the terminal for instructions (R. 115a). The evidence is uncontradicted that no shipments were picked-up or delivered outside the State of Pennsylvania nor was any bona fide interstate shipment dependent upon the shipments originating and destined between points in Pennsylvania.

There is no evidence that Baltimore, Maryland was the hub of petitioner's operations. In fact the actual hub of petitioner's operations is Uniontown, Pennsylvania (R. 139a). Petitioner has completely failed to establish any legitimate reason for using the interstate route for purely

intrastate shipments. Its only excuse is that the only routes that could be used are the interstate routes as that is the only authority it has. But this merely begs the question. The Public Utility Commission has found that petitioner has no such authority for transporting shipments between points in Pennsylvania and it is submitted that not only does the Commission have jurisdiction to make such a finding but that the facts amply support the finding.

Petitioner contends it has a legitimate reason for using the interstate route based on the fact that the intersate route had been set up some 15 years ago because of road conditions in Pennsylvania. But petitioner's President admitted that the route was set up for bona fide interstate shipments which originated or were destined between points in the western part of Pennsylvania and points in New Jersey and New York. See Record 138a. There is absolutely no evidence that this route was ever set up for the transportation of shipments originating and destined in Pennsylvania. Petitioner further contends that this operation has been conducted for many years and that only recently has the Public Utility Commission ever made complaint. The answer to this is clear and conclusive. It is only recently that petitioner began such operations, namely shipments originating in one point in Pennsylvania for delivery to another point in Pennsylvania. That is undoubtedly the reason that the question of whether or not these shipments were bona fide was never raised in the proceedings before the Interstate Commerce Commission and is the reason that the Pennsylvania Public Utility Commission never appeared and intervened in those proceedings and that is the reason that no action has been taken by the Pennsylvania Public Utility Commission until recently.

It is important to note two other factors which point conclusively to the operations of the petitioner being a subterfuge. The original complaint brought against the petitioner alleged transportation between Philadelphia, Pennsylvania and Pittsburgh, Pennsylvania via routes wholly

within the State of Pennsylvania. At the hearing on the complaint it was conclusively proven that such transportation was performed by routes wholly within the State of Pennsylvania without authortiy from the Pennsylvania Public Utility Commission. It is interesting to note that petitioner took no appeal from this finding of the Pennsylvania Public Utility Commission. Thus, we have at least one incident of record where the appellant admitted illegal transportation. *The fact that petitioner has transported directly between Philadelphia, Pennsylvania and Pittsburgh, Pennsylvania, is an important factor to be considered in determining whether or not petitioner's contention that the route via Baltimore is a legitimate route.*

The other important factor to be noted in this case is that the motor vehicles used in the illegal operations were leased with drivers on a per trip basis from another company named Eastern Freight Lines (R. 68a, 69a, 97a, 101a). Although the testimony shows that the vehicles were leased there was no written lease in the possession of both parties and the method of compensation was on a per diem basis on a percentage of the gross revenue obtained from the shippers for the transportation of the merchandise (R. 101a).

Under this method of operation Atlantic Freight Lines, Inc., did not control the supervision and operation of the drivers, but that was left to an alleged eastern manager from whom the vehicles were actually leased (R. 66a, 94a-95a). Under this method of operation, which is of doubtful legality, it is no wonder that Atlantic Freight Lines, Inc., could not control the routes over which its drivers operated and as set forth above on some occasions the trucks operated directly over routes entirely within the State of Pennsylvania and the illegality of that type of operation is admitted even by Atlantic Freight Lines, Inc. Certainly a method of operation over which the certificated carrier cannot even control the routes over which it operates should be only another factor in conclusively showing that petitioner's operations were a subterfuge and not subject to the

jurisdiction nor the control of the Interstate Commerce Commission.

3. Conclusion.

Under the decided cases the facts as set forth in this record conclusively reveal that the operations of the petitioner were a subterfuge to evade the jurisdiction of the Pennsylvania Public Utility Commission. The Interstate Commerce Commission did not by its certificate authorize operations of an intrastate nature between Philadelphia and the Pittsburgh-McKeesport area via Baltimore, Maryland. For these reasons the issues involved in this proceeding are strictly one to be resolved by the Pennsylvania Public Utility Commission and the appellant courts of the State of Pennsylvania. There is no question of interpretation of Federal Law involved. There is no question of interpretation of the Federal Constitution involved.

WHEREFORE, we respectfully urge your Honorable Court to deny the prayer of the Petitioner for Writ of Certiorari.

Respectfully submitted,

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